Issues in the rehabilitation of failed residential projects in Malaysia: clash between the interests of purchasers and secured creditor chargee

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Abstract: One of the main problems in the Malaysian housing industry is the failed residential projects. It is evident that Malaysian laws are inadequate to protect the interests of the stakeholders, especially the purchasers, in failed residential projects. This paper analyses the liquidation law and issues in one of the failed residential projects in Malaysia, particularly the position of the secured creditor chargee and the purchasers. This paper finds that the secured creditor chargee of the liquidated housing developer company enjoys priority over the assets and moneys of the liquidated housing developer company, even at the expense of the aggrieved purchasers' interests. Owing to this, the rights of the purchasers are marginalised. Thus, following some analyses over the liquidation legal provisions and the housing law, this paper suggests certain proposals to improve the current state of law governing rehabilitation of failed residential projects in Malaysia to preserve the interests of the purchasers.

Keywords: liquidation law; failed residential projects; liquidated housing developer company; secured creditor chargee; aggrieved purchasers; Malaysia.

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1 Introduction

It is a common phenomenon that when housing developer companies abandoned their residential projects, the fates of the aggrieved purchasers are not fully protected by the housing law in Malaysia. As a result, the purchasers suffer many troubles including not being able to occupy the housing units they purchased and they have to suffer other pecuniary and non-pecuniary losses such as the burden of paying monthly instalment to their end-financiers until full settlement. This is unfair to the purchasers, while at the same time, the defaulting housing developer companies after having received benefits escape any liability (Md Dahlan, 2009, 2012; Md Dahlan and Syed Abdul Kader, 2012).

Likewise, it is also the contention of the author that, when housing developer companies are wound up and abandon their residential projects, the fates of the aggrieved purchasers are not protected by the Malaysian liquidation law. The author views that the liquidation law in Malaysia only protects the interests of the creditors and other persons as enumerated in section 192 of the Companies Act 1965 (CA), not the aggrieved purchasers in failed residential projects. Thus, the rights and interests of the aggrieved purchasers in the failed residential projects of the liquidated housing developer companies are not well taken care and preserved by the liquidation law in Malaysia (Md Dahlan, 2012; Md Dahlan and Syed Abdul Kader, 2012).

The purpose of this paper is to examine the position and issues of the secured creditor chargee vis-à-vis the purchasers in a failed residential project in Malaysia of the liquidated housing developer companies.

The methodology of this paper is a composite between legal research methodology and social qualitative case-study research methodology. The data generated for this paper was taken from the files of the Department of Insolvency of Malaysia, the Land and District Office and the Ministry of Urban Well-Being, Housing and Local Government (MUWHLG) as well as from interviews with the key persons and from the author's personal observations. The failed residential project that is the subject of analysis of this paper is Phases 1A, 1B and 2 of Taman Lingkaran Nur, KM 21, Jalan Cheras-Kajang, P.T No. 6443, H.S (D) 16848, Mukim of Cheras, District of Hulu Langat, Selangor (the said project).

1.1 Background of the said project

The said project was launched in 1988 by a developer – Saktimuna Sdn. Bhd (Saktimuna) with a total acreage of 67.94, alienated from the State Government of Selangor. Originally, the developer was responsible for the development of 269 units of single-storey-terrace-houses, 40 units of double-storey-terrace-houses, 150 units of low-cost-houses, 160 units of low-cost-flats, 9 units of low-cost-shop-houses, 16 units of light-industrial-units ($30' \times 100'$), 55 units of light-industrial-units ($25' \times 80'$), a unit of public hall, one unit of TNB electrical power station, biosoil system and petrol station, etc. Initially, this purported residential development project was divided into three (3) phases – Phase 1, Phase 2 and Phase 3. Only a portion of Phase 1, *viz* Phase 1A (Phase 1 was divided into Phase 1A and 1B), had been developed by the developer. However, this phase was abandoned midway. Its construction stopped at the stage of 60% completion (Department of Town and Country Planning, file number: PTD. U.L1/2/364-Semt).

The said project was a result of a privatisation project between Saktimuna Sdn. Bhd (the defaulting developer) and the Selangor State Government. The latter was the owner

of the said project land, who later granted and alienated the land to the defaulting developer to develop it into a housing project subject to certain terms and conditions. However, in the course of the development of the said project, the project failed and was later abandoned, as the defaulting developer (Saktimuna) faced serious financial problems owing to insufficient sales and revenues generated through sales and their inability to meet the development and construction costs, which persisted from 1992 until early 2000 (Md Dahlan, 2011a).

The said project was subsequently taken over by one Syarikat Lingkaran Nur Sdn. Bhd (SLN) – the first rehabilitating party with the consent of the State Government of Selangor and the defaulting developer. Unfortunately, SLN also suffered the same fate, i.e., it was also unable to complete the said project owing to financial constraints (Md Dahlan, 2011a).

On the instruction of MUWHLG and numerous appeals from the aggrieved purchasers, Syarikat Perumahan Negara Berhad (SPNB), being a government developer, had taken over a part of the project, i.e., Phase 1A, from SLN, with the consent of the Selangor State Government and Saktimuna. Being a Government Linked Company (GLC), SPNB obtained funds from the Malaysian Ministry of Finance (MOF) to revive the project. The rehabilitation succeeded. However, this rescue was a government social duty, in that, the available moneys in the hands of the end-financiers were insufficient to meet the rehabilitation costs. MOF had to top-up funds to ensure the completion of the rehabilitation. In the course of the rehabilitation, there were several problems faced by SPNB, and one of them was the refusal and failure of certain purchasers to give consent to SPNB to carry out the purported rehabilitation works. Thus, not all the units in Phase 1A had been fully rehabilitated and obtained certificate of fitness for occupations (CF). The remaining phases (Phases 1B and 2) have as yet been revived. At the time of writing this paper, these phases are still in the course of negotiation and study for rehabilitation, both by Saktimuna, the official receiver (OR) (being the Kuala Lumpur Department of Insolvency or in Malay is called Jabatan Insolvensi Malaysia Cawangan Kuala Lumpur (KL JIM)) and the new chargee (Idaman Wajib Sdn. Bhd (IWSB)). On the other hand, Phase 3 of the project had been completed through a joint venture between Tanming Sdn. Bhd and SLN, and currently known as Taman Cheras Idaman (Md Dahlan, 2011a).

The developer company (Saktimuna) was wound up on 11 March 2005 upon the winding up application of the Inland Revenue Board (IRB) (Lembaga Hasil Dalam Negeri – LHDN) for its failure to settle the corporate tax to LHDN. On 11 March 2005, the OR (KL JIM) was appointed as the provisional liquidator for the developer company. The OR was also appointed as the liquidator for the developer company on 12 May 2009 (Kuala Lumpur Department of Insolvency file no. JIM(WP)14/2005/A).

Phases 1B and 2 at Taman Lingkaran Nur were vested in one Singesinga Sdn. Bhd (Singesinga) by the chargee lender – Messrs CIMB Bank Berhad (CIMB) in settlement of the outstanding unpaid loan of Saktimuna to the chargee lender (CIMB), through a court's vesting order. But surprisingly, this had not been informed to the OR (as the liquidator) and the OR had not given any consent for such a legal action (application to vest the rights and interests of CIMB in Phase 1A and B to Sinesinga in settlement of all the outstanding loans of Saktimuna to CIMB) (Md Dahlan, 2011b).

As at the end of 2012, there is no plan to rehabilitate Phase 1B. However, in respect of Phase 2, there is an interested buyer to purchase the land in settlement of the redemption sum as prescribed by the new chargee (Sinesinga). This interested buyer is IWSB. In this project (Phases 1A, 1B and 2), the OR as the liquidator did not rehabilitate

the project but only coordinates the stakeholders. As on 31 December 2010, there was no rehabilitation or resumption of the residential project for Phases 1B and 2 at Taman Lingkaran Nur (Md Dahlan, 2011b).

1.2 Rehabilitation of phases 1B and 2

As on 31 December 2010, there was no rehabilitation of the said project for Phases 1B and 2. Nonetheless as mentioned earlier, the recent news is that there is a party that is interested to buy the whole residential project area at Phase 2 and settle all the damages of Phase 2's purchasers, namely Messrs Idaman Wajib Sdn. Bhd (IWSB). IWSB is the developer responsible for a residential project adjacent to the said project. IWSB proposed to purchase the said secured land (Phase 2 with 107 lot titles charged to Sinesinga) to Sinesinga at the price of MYR 2.5 million (USD 758,545.00). IWSB would also refund the 10% deposits to Phase 2's purchasers, which amounted to MYR 746,507.00 (USD 226,503.66). In addition, IWSB would be liable to settle the outstanding quit rent for the 107 lots amounting to MYR 144,450.00 (USD 43,838.73) and the assessment rates of the Majlis Perbandaran Kajang – Kajang Municipal Council (MPKj) (Ministry of Urban Wellbeing, Housing and Local Government file number: KPKT/07/PT/824/4275/E).

It should be noted that, prior to the offer made by IWSB, SPNB was assigned by the MUWHLG to carry out rehabilitation of Phase 2 of the said project. SPNB had also offered the chargee creditor – CIMB for a price of MYR 1.5 million (USD 455,127.00) to purchase Phase 2 and redeem all the outstanding loans still unpaid by Saktimuna Sdn. Bhd. However, CIMB rejected this offer. According to SPNB, the outstanding loan unpaid by Saktimuna as on 11 May 2009 to CIMB was MYR 3,967,565.09 (USD 1,203,830.66) including interest. CIMB had attempted to sell off the said Phase 2 by way of public auction in June 2008 but this was aborted owing to there being no bidders. Thus, bearing on this fact – the exorbitant redemption sum, which needed to be settled coupled with the exorbitant costs to rehabilitate Phase 2, SPNB had to abort their intention to rehabilitate Phase 2 (Ministry of Urban Wellbeing, Housing and Local Government file number: KPKT/07/PT/824/4275/E).

As on 15 April 2008, Phase 1B, which consisted of 52 units, had been fully sold to purchasers. The completion stage for Phase 1B was between 0% and 35%. Phase 2, which consisted of 108 units, 98 of the units had been sold to public. However, these 98 units had not been constructed at all (i.e., still being a barren land).

1.3 Problems in the rehabilitation of phases 1A and 2 of the said project

In the course of rehabilitation of the failed residential project by the rehabilitating parties (SLN and SPNB), there were many problems and issues, among them namely are:

1 there is no provision in the Companies Act 1965 (CA) providing a clear duty on the liquidator to carry out rehabilitation of failed residential projects for the benefit of the aggrieved public purchasers (stakeholders)

2 there is no provision in the CA, which provides the aggrieved purchasers with protection to have their failed residential project revived.

2 Legal analysis

This paper will analyse in legal terms the position of the secured creditor chargee and the purchasers once a housing developer company is subject to liquidation administration. The objective of the analysis is to look at the extent to which the rights and interests of the secured creditor chargee as well as the purchasers are protected. It will also address the issues and problems plaguing these parties. Furthermore, this paper will suggest certain legal approaches to cushion the problems faced by these parties in the liquidation administration.

Following the above, a question can be raised: insofar as Taman Lingkaran Nur is concerned, whether the rights of the secured creditor chargee in the secured land (Phase 2) override the rights of the OR as the liquidator in respect of collecting and disposing all the assets of the wound up company to settle the secured creditor/chargee and other unsecured creditors' debts?

In the instant case study, there are two (2) issues involving the act of the chargees (CIMB and Sinesinga) in dealing with the secured property (the Phase 1B and Phase 2 lands), viz:

1 The act of CIMB vesting all their rights and interests in the secured property (Phases 1B and 2) of the said project to Sinesinga through court's order without obtaining consent or informing the OR (being the Department of Insolvency of Kuala Lumpur), the judgement debtor chargor and the aggrieved purchasers of their (CIMB) intention or at the application for the vesting order should also involve these interested parties (the OR, the judgement debtor chargor and the aggrieved purchasers). Is this act not against section 223 (Avoidance of dispositions of property, etc.) and 224 (Avoidance of certain attachment, etc.) of the CA?

2 The act of Sinesinga in attempting to sell off the secured property (Phase 2) below market value to a third interested purchaser (IWSB) also without obtaining consent from or involving the OR, the judgement debtor chargor and the aggrieved purchasers. Is this act also not against section 223 (Avoidance of dispositions of property, etc.) and 224 (Avoidance of certain attachment, etc.) of the CA?

According to the government valuation, the land (Phase 2 being the security to the loan granted by the first chargee – CIMB Bank Berhad) was worth more than MYR 4.9 million (USD 1,486,748.20). However, Sinesinga (as the new vested chargee) agreed to sell the land at the price of MYR 2.5 million (USD 758,545.00) as the full settlement and redemption of the debts by Saktimuna. Nevertheless, in the opinion of the author, if the land is sold below market value, this will prejudice the rights of the chargor (Saktimuna) who is entitled to get the highest possible price for the land. The rationale of obtaining the highest price is for the benefit of the chargor (Saktimuna) in that the balance proceeds can be used to settle off the debts of the IRB, pay off the OR's fees, settle the claims and reimburse for the losses suffered by the aggrieved purchasers (Phases 1A, 1B and 2) or finance the rehabilitation scheme of the abandoned units for the benefit of the stakeholders (especially the purchasers).

Similar contention is also made regarding the attempt by Sinesinga (as the new chargee) to sell the charged land by way of a private treaty to IWSB using below market price.

Section 292(1) of the CA provides that no unsecured and other debts can prevail over the secured debts. It means that, the proceeds from the winding up process shall be used to settle the listed debts, according to priority, as prescribed under section 292(1) of the CA over other types of unsecured debts. Nonetheless, the secured debts are excluded from the operation of section 292 of the CA (*Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600). This means that secured debts cannot be dealt with by the liquidator. Only the chargees can deal with the secured debts by way of foreclosure or otherwise. Thus, looking back at the issue in Taman Lingkaran Nur's case, it is clear that the liquidator (the OR) does not have any power over the charged land and its disposal. Only the chargees – CIMB and Sinesinga – have the absolute right to deal with the charged land including to apply to the court for an order for sale and the proceeds realised from the sale could be used to settle off the secured debts. This situation (the absolute right of the chargee) may become a lacuna in the law and inequitable to the judgement debtor/wound up housing developer company (Saktimuna), as the charged land was sold below market value to the prejudice of the judgement debtor (Saktimuna) and the aggrieved purchasers. Furthermore, the liquidator has not even attempted to prevent the selling of the charged land below the market value, on the ground of equity and public interests. It is re-emphasised here that if the charged property was sold at market value, the proceeds realised from the sale can be used to settle off the judgement creditor's (IRB – LHDN) debts and to pay compensation of the aggrieved purchasers or it can be used to finance the rehabilitation, to a certain extent, thus lessening the problems and burden of the aggrieved purchasers and the rehabilitating parties.

A secured creditor need not prove his or her debt in a winding up and wait for payment with other unsecured creditors. Instead, on default, a secured creditor has the right to realise the secured assets. Thus, to the extent of the amount realised, a secured creditor is unaffected by a winding up. The question of who is a secured creditor is governed by the Bankruptcy Act by virtue of section 291(2) of the CA. In the case of companies, its secured creditors include debenture holders who have fixed or floating charges over particular assets. Generally, secured creditors are paid ahead of unsecured creditors. However, secured creditors may prove their debts where the debts exceed the value of the property secured. When secured creditors prove their debt, they lose their security and rank equally with the unsecured creditors (Rachagan et al., 2004; Cheang, 2002).

Be that as it may, the chargees (CIMB and Sinesinga), it is submitted, are still subject to the provisions of sections 223 and 224 of the CA (i.e., to obtain the court's order, including consent from the OR), before they can vest or sell off the secured property. Their failure to pay heed to the requirements under these sections may warrant nullity of their transactions (vesting order and sale), as these transactions are detrimental to the interests of the chargor borrower (Saktimuna) and other eligible stakeholders (such as aggrieved purchasers and unsecured creditors). In the opinion of the author, despite the fact and the law that CIMB can invoke section 216 of the National Land Code 1965 (NLC) to vest the said charged land in Sinesinga (as the transferee), CIMB should be beware and circumspect that such a transaction (vesting order sale) could prejudice the right of the chargor (Saktimuna) and that the price paid by Sinesinga in the vesting order transaction was below market value. It is opined the vesting order and the transfer to Sinesinga might amount to an unconscionable transaction, inequitable and unfair as against the chargor (Saktimuna). In this respect, it is opined, the OR or the chargor or the

aggrieved purchasers should intervene or apply to the court to nullify and set aside the vesting order sale and request CIMB as the chargee and transferee to apply the true market value of the said secured land before the said secured land be transferred to Sinesinga (transferee). This is to protect the rights and interests of the chargor and the purchasers in the failed residential project.

In another respect, can the chargee (CIMB) apply section 216 of the NLC to transfer the said secured land to Sinesinga by way of court's vesting order without resorting to the law and procedure to enforce charge under the NLC? In the opinion of the author, CIMB as the chargee is obliged to sell the charged land by way of a judicial sale governed by the NLC. This is the law expounded in *Kimlin Development Sdn Bhd v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805 (Supreme Court). In other words, the chargee (CIMB) could not contract out the provisions under the NLC relating to the judicial sale of the charged land by way of invoking section 216 of the NLC or any private treaty to circumvent the law on charge action. Furthermore, the court in *Kimlin* held that provision under section 223 of the CA must be observed before the chargee sells the charged land if the judgement debtor borrower is subject to a winding up order. In *Kimlin*, there were two security methods. First, by way of a legal charge over a land and registered in accordance with the NLC. Second, there was a debenture, giving right to the chargee to appoint receiver and manager to deal with the charged land on the occurrences of certain events. However, *Kimlin* does not involve failed residential project and any aggrieved purchaser.

In the opinion of the author, section 216 of the NLC is only appropriate to be used in *bona fide*, private and direct transactions, for example, in inheritance land transfer, not involving dynamic and diverse interested parties and public interest/right such as that happened in this case (Taman Lingkaran Nur) where the transaction of the charged land might affect the interests and rights of the chargor (Saktimuna) and the aggrieved purchasers.

Similar principles as established in *Kimlin* were also adopted by the court in *Melatrans Sdn Bhd v Carah Enterprise & Anor* [2003] 2 MLJ 193 (FC). In *Melatrans*, there were two securities over the same land, viz a legal charge and a debenture, which contained a power of attorney (PA). In the PA, there was a clause that provides an appointment of a receiver and manager if the borrower chargor defaults on the loan. The receiver and manager were to sell the charged land to settle off the borrower's debts. Similar to *Kimlin*, *Melatrans* does not also involve failed residential projects and any aggrieved purchaser.

However, in the recent case – *Lim Eng Chuan Sdn. Bhd v United Malayan Banking Corp & Anor* [2011] 1 MLJ 486 (Court of Appeal at Putrajaya), the court in majority (Low Hop Bing and Zaharah Ibrahim JJCA) allowed the secured creditor to sell the charged land (first-party legal charge) to a third party without having any obligation to resort to the provisions under the NLC for a judicial sale. The secured creditor relied on the power of attorney's (PA) terms in the deed of debenture being the second security document, which gave them a right and power to sell by way of private treaty to any interested purchaser of the secured land. The court held that the right given under the PA was sufficient enough for the chargee (secured creditor) to sell the charged land and absolved the chargee (secured creditor) from complying with the rigid procedure for judicial sale in the NLC. In *Lim Eng Chuan*, there were also two security methods. First, the loan was secured by a legal charge pursuant to the NLC. Second, there was a debenture containing a Power of Attorney giving right to the chargee to sell off the charged land if the borrower chargor defaults on the loan. The difference between

Lim Eng Chuan and CIMB sale in Taman Lingkaran Nur is that in *Lim Eng Chuan* (similar to *Kimlin* and *Melatrans*), it does not involve failed residential project and any aggrieved purchaser.

According to Zaharah Ibrahim JCA in *Lim Eng Chuan* at page 535 of the reported case:

> "**As the first respondent here was exercising the power of attorney granted under section 6.06 of the debenture, it was acting on behalf of and as agent for the appellant (the chargor)**. On the basis of *Melantran's* case, the provisions of the National Land Code in Part 16, Chapter 3 does not, therefore, apply." (emphasis added)

The court in *Lim Eng Chuan* also concurred in majority that the chargee (secured creditor) need not obtain any court's approval pursuant to section 223 of the CA, as the borrower company (chargor) was also subject to a winding up order. Thus, by the existence of the PA in the deed of debenture, the right of the chargee to sell the charged land by way of a private treaty is absolute and prevails over the provisions of the NLC (for enforcement of charge) and the CA (the winding up provisions).

Low Hop Bing JCA (one of the majority) in *Lim Eng Chuan* also held that the PA clause gives the chargee the right to sell the charged land by way of a private treaty without having to be subject to a judicial sale under the NLC. His Lordship rejected the judgement of the then Supreme Court in *Kimlin*, which held that no power of sale of land can be conferred by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure laid down in the Code. The Supreme Court in *Kimlin* held that any sale of the charged land without using judicial sale prescribed under the NLC is void. The reason as to why Justice Low Hop Bing did not accept the judgement in *Kimlin* was because in *Lim Eng Chuan* case there was a PA giving right to the chargee to sell the charged land upon occurrence of certain events. On the other hand, in *Kimlin* case there was no such a PA giving such purported power and right to the chargee. In *Kimlin*, there was only a right in the debenture, which gave a right to the chargee to appoint receiver and manager to deal with the charged land to settle off the debts of the judgement debtor chargor. As the facts in *Kimlin* are distinguishable from *Lim Eng Chuan's*, Justice Low Hop Bing opined that the law as applicable and adopted in *Kimlin* cannot be made applicable to *Lim Eng Chuan.*

In respect of the applicability of section 223 of the CA in *Lim Eng Chuan*, Low Hop Bing JCA said, at page 500 of the case, as follows:

> "In my judgement, ...**section 223 is inapplicable because the bank was exercising its right under a security when the bank sold the land**. Our section 223 may be examined together with the equipollent provisions of section 368 of the Companies (New South Wales) Code. In this regard, I find support for my view in *Re Margart Pty Ltd (in liq); Hamilton v Wespac Banking Corp* (1984) 2 ACLC 709 at pp.710–712 and 714 where Helschm CJ considered section 368, in particular, the phrase 'any disposition of the property of the company'. **The learned CJ of the Supreme Court of New South Wales held that section 368 was not intended to reach out to transactions by which a secured creditor receives assets covered by his security at a time when he was entitled to have them**..." (emphasis added)

However, Mohd Hishamuddin JCA, as the minority view, in the instant case (*Lim Eng Chuan*) disagreed with the majority findings of the court. He opined that once the land is

subject to legal charge and registered under the NLC's provisions, the chargee must apply judicial sale to sell the land. Second, the requirement under section 223 of the CA must also be fulfilled before the chargee can sell the charged land, i.e., the chargee must get approval of the court before proceeding to sell the charged land. The existence of debenture and PA shall not affect or exempt, in any iota, the mandatory requirement under section 223 of the CA. As regards the requirement to comply with section 223 of the CA, Mohd Hishamuddin (dissenting judgement and as a minority view) put at page 514 of the reported case as follows:

> "...In my opinion, for the purpose of section 223, it makes no difference whether it was a sale by way of a power of attorney or whether it was a sale by receivers and managers under a debenture. The point is that a sale had taken place or intended to take place. It is immaterial who did the selling and how the sale was done. What matters is that a sale of a property of a company that had been wound up had taken place without the permission of the winding up court.
>
> **I must add here that in the present case, had the first respondent made the application to the winding up court for the sale of the lands, then all parties having a direct interest in the lands, such as the liquidator and the creditors, would be entitled to object to the application if any of them had a valid reason to do so.** It might very well be that at the end of the day the winding up court grants the first respondent's application to sell the lands. **But the point is that there is a monitoring authority in place in the form of the winding up court, and any party having an interest, and opposing the intended sale, would have had an opportunity of being heard before the proposed sale is carried out. In other words, the right to sell the lands should not be determined unilaterally by the first respondent being a party claiming to be holding the lands as securities.**"(emphasis added)

On the issue as to whether the chargee can absolve from complying with the requirement for judicial sale as spelt out in the NLC to sell the charged land by way of a private treaty, the same judge stated at pages 220 and 221 of the reported case, as follows:

> "...I shall now revert to the facts of the present case, and I shall pose the following pertinent questions: in the present case, was the sale undertaken or effected by the chargee (the lender bank, United Malayan Banking Corp/the first respondent)? Or, was the sale effected or undertaken by the chargor (the appellant/borrower company, Lim Eng Chuan Sdn Bhd)? It is to be recalled that under the debenture a power of attorney had been issued by the chargor in favour of the chargee; and it is to be noted that the sale and purchase agreement with the second respondent (the purchaser, Southern Realty (M) Sdn Bhd) was signed by an officer of the chargee bank as an attorney of the chargor pursuant to the power of attorney, and the chargor was named in the agreement as the vendor. **If the sale is regarded as having been undertaken or effected by the chargee then, on the authority of *Kimlin* and *Melatrans*, the sale was void as it contravened the National Land Code because the sale was not a judicial sale carried out in accordance with Part 16 of the National Land Code. But, on the other hand, if the sale is considered to have been undertaken or effected by the chargor (with the consent of the chargee) then on the authority of *Melatrans*, the sale is valid as such a sale need not have to be a judicial sale under the National Land Code. In other words, the sale could be done by way of a private treaty.** In the present case, in my judgement, although there is the power of attorney, and that the sale and purchase agreement named the chargor as the vendor, nevertheless, it is unrealistic and unfair to regard the sale as a sale undertaken or effected by the chargor. In the present case, it is the chargee bank that is desirous of enforcing the security and that gave notice to the chargor's solicitors stating that the bank

> would exercise its powers to sell the lands under the debenture. It is the chargee bank that subsequently took out the advertisement. It is the chargee bank that gave notice of its intention to sell the lands to the chargor's directors; and it is the chargee bank that issued a notice to the chargor and took physical possession of the property pursuant to cl 6.02(a) of the debenture. Indeed, it was the chargee's officer who signed the sale and purchase agreement. Furthermore, in the present case, there is no involvement of any intermediary such as a receiver and manager. And, an important factor to note is that the relationship between the donor of the power of attorney and the donee of the power of attorney is not merely that of a normal agency. The relationship is deeper than that. **In the present case, the power of attorney is a power of attorney not for the benefit of their principal, the donor/chargor, but for their own benefit to achieve the objective of the debenture arrangement between the donor/chargor and the donee/chargee. Therefore, in fact and in law the sale must be deemed to have been effected or undertaken by the chargee rather than by the chargor.** It was only a legal formality that the chargor was named as the vendor in the sale and purchase agreement as the sale was made pursuant to the power of attorney. **Since the sale was undertaken or effected by the chargee and not by the chargor, then legally it should have been effected in accordance with the provisions of the National Land Code pertaining to the charges. In other words, there should have been a judicial sale. Since the sale was not a judicial sale under the Code, therefore, the sale was invalid.**" (emphasis added)

Yet in another case – *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn. Bhd (in liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201; [2005] 1 CLJ 793 (Federal Court at Putrajaya), the court held that following a winding up of the judgement debtor chargor company, the receiver and manager appointed under a debenture loses his status as the agent of the judgement debtor chargor company. He continues to retain his possessory powers as a receiver and manager whilst the liquidator exercises his statutory powers and duties under the CA. There is no question of any superior ranking. They exist side by side with each exercising his separate powers and duties conferred on them by the CA in the case of liquidator and by the debenture in the case of the receiver and manager. Nonetheless, this case (*K Balasubramaniam*) does not involve issues of vesting order, below market price value for the transfer of land and does not involve failed residential project and any aggrieved purchaser.

In the opinion of the author, *Kimlin* case and Mohd Hishamuddin's dissenting judgement in *Lim Eng Chuan* case are more equitable and appropriate to be applied in Taman Lingkaran Nur's case. This is because, in Taman Lingkaran Nur, the matter involves public interests and rights – i.e., the chargor (Saktimuna) and the aggrieved purchasers. If the transfer/sale was to be made through a judicial sale with the involvement of the OR, the chargor or the aggrieved purchasers and that the price of the secured land would use the market value, the public interests might be better served than if the land was to be sold by way of a private treaty, where the market value or better price of the charged land might have been tolerated owing to the unilateral business expediency of the chargee, thus unfairly negating the pecuniary and non-pecuniary interests of the chargor and the aggrieved purchasers in the failed residential projects.

The above-mentioned contention and finding are made by way of an analogy with the available cases as reported in law journals. Ironically, there has as yet similar reported case law that have similar facts as that happened in Taman Lingkaran Nur particularly on the issue that the chargee bank (CIMB) had transferred the charged land owned by the

liquidated chargor debtor company at a below market value price by way of court's vesting order and involves an failed residential project and the aggrieved purchasers. It is the hope of the author that in the near future cases like what have happened in Taman Lingkaran Nur could be dealt with by the Malaysian courts to give a decisive, clear law and equitable decision on the issues discussed earlier.

In the submission of the author, the act of CIMB to have sold the charged land to Sinesinga through court's vesting order under section 216 of the NLC is repugnant to the intent and spirit of the provisions under the NLC, which require the sale should be made through a judicial sale, not a private treaty. Furthermore, the sale made to Sinesinga used below market price of the land. This prejudiced the rights and interests of the chargor Saktimuna and the aggrieved purchasers in the failed residential project. Thus, it is opined, the OR, chargor Saktimuna and the aggrieved purchasers should have intervened or if intervention is not possible, to apply to set aside the vesting order and the sale made to Sinesinga or alternatively the vesting order and the sale must use the market value of the charged land. Furthermore, the facts and nature of the vesting sale made by CIMB are dissimilar to the facts and nature as in the reported case law like *Kimlin, Lim Eng Chuan, Melatrans* and *K. Balasubramaniam*, which may warrant a private treaty sale of the charged land that involves a wound up chargor borrower company. Likewise is the situation of the purported sale by Sinesinga to IWSB, if the sale was to proceed. Thus, it is opined both sales are void and should be set aside, as they have contravened the law in the NLC, CA, public interest and equity of the chargor and the aggrieved purchasers in the failed residential project. Thus, it opined that, it is high time for the Malaysian government to introduce a special legal regime governing rehabilitation of failed residential projects. This special legal regime can regulate the rehabilitation, the conduct of the rehabilitating parties in the rehabilitation and protect the interests of the aggrieved purchasers.

Furthermore, in the opinion of the author, the applicant developers must obtain residential project insurance before their applications for housing developer's licence can be approved by the MUWHLG. The purpose of this insurance is to cover any shortfall of the available funds to finance rehabilitation of their projects if these projects are, inevitably, terminated and failed midstream. This insurance payment shall be paid in priority to all payments as prescribed under section 292(1) of the CA (section 292(5) of the CA).

3 Conclusion

On the basis of the instant case-study analysis and examination of the reported case law, it is obvious that in liquidation administration, there is an unclear and indecisive position on the powers and superiority of the MUWHLG and its Minister over the creditors, contributories and the members of the liquidated companies, in respect of giving directions to the liquidator to carry out rehabilitation and protect the interests of the purchasers in the failed residential projects in Malaysia. To overcome the problems as illustrated earlier, the author recommends that Malaysian government should impose a requirement on the applicant housing developer to possess residential project insurance before any housing developer's licence can be issued. The purpose of this insurance is to serve as a support if the residential project fails in that the insurance money can be used to finance the failed project to completion in the event the available moneys are

insufficient. Finally, to ensure that the rehabilitation of the failed projects can be smoothly executed and protect the rights and interests of the stakeholders particularly the purchasers, the author suggests to the Malaysian government to incorporate a new regulation governing rehabilitation of the failed residential projects in the Housing Development (Control and Licensing) Act 1966 and its regulations (Act 118).

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